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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION
14

15 WINDSOR AUCTIONS, INC., a Florida
corporation, and JEWELRY AUCTIONS
16 CORPORATION, a New Jersey corporation,

17 Plaintiffs,

18 v.

19 EBAY, INC., a Delaware corporation,

20 Defendant.
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Case No. C 07 06454 RMW

**EBAY'S REQUEST FOR JUDICIAL NOTICE
IN SUPPORT OF EBAY'S MOTION TO
DISMISS PLAINTIFFS' COMPLAINT**

Date: March 28, 2008
Time: 9:00 a.m.
Judge: Ronald M. Whyte
Trial Date: Not yet set

I. DOCUMENT TO BE JUDICIALLY NOTICED

Pursuant to Federal Rule of Evidence 201(b), defendant eBay Inc. (“eBay”) hereby requests that the Court take judicial notice of the following document in connection with eBay’s Motion to Dismiss:

Agreement between eBay Inc. and Windsor Auctions, dated April 26, 2005

(“Agreement”), referred to in paragraphs 10 and 31 of Plaintiff’s Complaint, a true and correct copy of which will be lodged with the Court under seal.¹

II. ARGUMENT

This Court may consider facts and documents subject to judicial notice in connection with a party’s motion to dismiss. *See, e.g., MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (on a motion to dismiss, court may take judicial notice of matters of public record outside the pleadings). Judicial notice is appropriate for facts “not subject to reasonable dispute” that are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Under Federal Rule Evidence 201(d), “[a] court shall take judicial notice if requested by a party and supplied with the necessary information.” Fed. R. Evid. 201(d). “[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.” *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

Judicial notice of the Agreement between eBay Inc. and Windsor Auctions, dated April 26, 2005, is appropriate because the agreement is referenced in paragraphs 10 and 31 of Plaintiff’s Complaint. Although it was not physically attached to the pleading, its authenticity is

¹ In their Complaint, Plaintiffs explain that they “have not attached to this pleading a copy of the agreement between Windsor and eBay because it contains a confidentiality provision.” Compl. ¶ 35. Because an assessment of Plaintiffs’ allegations requires perusal of the terms of this confidential Agreement, and because, as explained herein, the terms of the Agreement are appropriate for consideration on motion to dismiss, a true and correct copy of the Agreement will be lodged with the Court under seal, pending the granting of the Administrative Motion to File Under Seal pursuant to Civ. L.R. 79-5, filed herewith.

1 not questioned by any party. Thus, it is appropriate for consideration on a ruling on a Rule
2 12(b)(6) motion to dismiss. *Branch*, 14 F.3d at 454.

3 **III. CONCLUSION**

4 For these reasons, eBay respectfully requests that the Court grant its request and take
5 judicial notice of the Agreement described herein.

6 Dated: February 12, 2008

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